

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

JACOB ROGINSKY,)	
Complainant,)	
)	
v.)	8 U.S.C. 1324b Proceeding
)	OCAHO Case No. 90200168
DEPARTMENT OF DEFENSE,)	
and CENTER FOR)	
NAVAL ANALYSES,)	
Respondents.)	
_____)	

THIRD PREHEARING CONFERENCE REPORT AND ORDER

(May 6, 1991)

I. Introduction

By Order dated March 8, 1991 a third prehearing conference was held on May 1, 1991. Because a court reporter was present and a transcript is pending, this Report and Order will be limited to a summary of the issues discussed, rulings made, and the schedule established during the conference.

II. Issues Addressed

A. Sovereign Immunity Defense

As agreed during the second prehearing conference, Complainant, Respondent Department of Defense (DoD), and the Office of Special Counsel (OSC), as amicus curiae, subsequently submitted extensive memoranda on the issue of sovereign immunity. The question addressed is whether Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), as codified at 8 U.S.C. §1324b, enacts liability for unfair immigration-related employment practices by executive branch departments and agencies, specifically the Department of Defense.

As announced at the conference, I find and conclude that the defense of sovereign immunity is not available to shield a federal entity from

liability under 8 U.S.C. §1324b. Although the question may be a close one, I find in IRCA a sufficient congressional waiver of sovereign immunity to bring such departments and agencies within the ambit of 8 U.S.C. §1324b. During the conference I expanded on that ruling, which will be explained in more detail in a forthcoming order.

B. Timeliness of Charge(s)

Complainant addressed the issue of timeliness that DoD asserts as to certain allegations of discrimination in the Complaint. The question is whether certain of the alleged discriminatory events in the charge filed by Complainant with OSC, and alleged in the Complaint, were the subject of timely filing within the statutorily prescribed 180 days after the date of the alleged discriminatory occurrences. 8 U.S.C. §1324b(d)(3). If the alleged discriminatory acts are not within the statutory period, Complainant seeks equitable relief.

Complainant and DoD agreed that resolution of these issues prior to the scheduled evidentiary hearing may considerably narrow the issues to be tried, and shorten the length of the hearing in chief.

DoD and Complainant agreed to attempt a joint stipulation of facts as a predicate to the filing of memoranda and affidavits in an effort to resolve the timeliness issue. To the extent the parties disagree, they will be expected to identify factual disputes. As agreed, these filings are to be submitted to the bench not later than June 12, 1991. Unless otherwise resolved, an evidentiary hearing on the issue of timeliness, including the bases, if any, for equitable relief, will be held on Monday, June 17, 1991 in the Hearing Room of the Executive Office for Immigration Review, Suite 2400, 5107 Leesburg Pike, Falls Church, Virginia.

C. OSC Intervention

OSC has been participating as amicus curiae. OSC advised that in light of the judge's decision on the issue of sovereign immunity, it may seek to intervene in this proceeding. As agreed, OSC will file, if at all, a motion to intervene not later than May 31, 1991. OSC will, in that event, seek agreement by the parties to its intervention prior to filing its motion.

D. Status of CNA

Complainant informed the bench that at present Dr. Roginsky is reviewing the documents obtained on discovery from Respondent Center for Naval Analyses (CNA). Complainant agreed on a best efforts basis to advise the bench not later than May 21, 1991 as to whether, upon examination of the documents, he will move to dismiss CNA as a Respondent.

CNA advised that if it remains in the case, its lead counsel would have a scheduling conflict with the previously agreed upon hearing dates. Accordingly, in the event CNA is not dismissed, the parties and bench agreed to reschedule the hearing to begin on Tuesday, September 10, 1991.

Assuming that the hearing is to begin on August 13, a fourth in-person prehearing conference is scheduled, as agreed, on July 25, 1991. That conference will focus on preparation for the evidentiary hearing as contemplated by 28 C.F.R. §§ 68.11, 68.22, and 68.41-45.

III. Schedule

To summarize, the following schedule has been established:

	<u>1991</u>
Filing of Complainant's Motion To Dismiss Respondent CNA (if any)	May 21
Filing of OSC's Motion to Intervene (if any)	May 31
Filings by Complainant and DoD on timeliness issue	June 12
Evidentiary Hearing on timeliness issue (if necessary)	June 17
Fourth in-person prehearing conference	July 25
Evidentiary Hearing dates if CNA is dismissed as a party	Aug. 13 - 23
Evidentiary Hearing dates if CNA remains as a party	Sept. 10 - 20 (except 9/18)

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Unless otherwise notified the location and time of the forthcoming hearings and conference will remain the same:

Hearing Room of the Executive Office for Immigration Review, Suite 2400, 5107 Leesburg Pike, Falls Church, Virginia 22041, to begin at 9:30 a.m., EDT.

SO ORDERED.

Dated this 6th day of May, 1991.

MARVIN H. MORSE
Administrative Law Judge